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AMER. RECORDS AND BRIEFS

(3)

No. 07-34

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SUPREME COURT, U.S.

In the Supreme Court of the United States

DESIGNING HEALTH, INC.,
Petitioner,

v.

UDO ERASMUS, FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., and THOMAS GREITHER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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September 18, 2007

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INTRODUCTION - SUMMARY OF OPPOSITION AND SUMMARY OF REPLY

THE OPPOSITION

Petitioner DHI asserted the Court of Appeals of the Federal Circuit did not fulfill its Seventh Amendment constitutional responsibilities in finding that after it reversed a denial of a JMOL as to damages, the Circuit is not required to (1) consider and (2) instruct the District Court as to which of the three Weisgram directions (Weisgram v. Marley Company, 528 U.S. 440 (2000)), the District Court should follow (App. A at 1a).

The Opposition, (Page 2) asserts:

"...the Federal Circuit fully analyzed the evidence of damages, reversed the damages awards, reversed the trial court's denial of JMOL (the opposition does not indicate only as to damages) and issued no instructions (App. E at 23a-24a, 34a, 36a, 37a), thereby giving notice that the trial court lacked authority to act further respecting evidence of damages..." (citing to) *Tronzo v. Biomet Inc.*, 236 F.3d 1342, 1348 (Fed. Cir. 2001); *Engle Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999).

Respondent's Opposition (page 2), then asserts:

"...Having failed timely to assert the contentions which they now seek to assert here, Petitioners waived those contentions and may not seek that relief here."

SUMMARY OF REPLY

Respondent misunderstands the Seventh Amendment constitutional issues which DHI presents. The Seventh Amendment constitutional error of the Federal Circuit in its February 26, 2007 Decision, (App. A), was its finding that the Federal Circuit's prior decision had fulfilled its constitutional obligations, though the prior Federal Circuit decision had not (1) considered and/or (2) directed one of the three Neely v. Martin K. Eby Construction Co., 386 US 317 (1967) alternatives.

The February 26, 2007 decision (App. A) assumed (contrary to Seventh Amendment jurisprudence), that its June 1, 2005 initial limited Federal Circuit decision (App. B at 37a), which upheld the District Court's denial of Respondent's motion for JMOL as to liability and reversed aspects of the District Court's denial of Respondent's JMOL motion as to damages, without further consideration and directions, was constitutionally sufficient.

The Supreme Court in Martin K. Eby, supra and Weisgram v. Marley Company, 528 U.S. 440 (2000) found that the Seventh Amended was not violated in that the Court of Appeals upon reversal of a denial of a JMOL as to liability had the jurisdictional authority to direct entry of judgment for the verdict loser.[1]

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[1] The Federal Procedure is contrary to California State law. California Code of Civil Procedure Section 629, which requires, in the very rare reversal of denial of a JNOV as to liability, that judgment be entered below for the verdict loser.

Petitioner DHI contends that an appellate court's reversal of a *JMOL* is but the first step of the Circuit Court's required constitutional analysis as identified in Neely, supra and Weisgram, supra to afford Seventh Amendment protection, (particularly as presented here with a Federal Circuit splitting its first decision in upholding liability (or affirming the denial of the trial court's post trial *JMOL* as to liability), and reversing the post-trial denial of JMOL as to damages).

Petitioner DHI asserts that upon reversing a denial of a JMOL (even as to liability), Seventh Amendment safeguards require the Federal Circuit to then explicitly undertake two (2) further steps: (1) that of considering which one of three alternatives as enunciated in Neely, supra and Weisgram, supra are appropriate: (1) directing entry of judgment below; (2) directing a new trial; or (3) directing that the district court "with the feel for the case" determine if a new trial is appropriate; and (2) that of then directing the District Court as to which of the three alternatives the Federal Circuit has selected.

Contrary to Respondent's arguments (Oppo. at 2), the Federal Circuit's June 1, 2005 DHI I decision (App. F) does not reflect (1) any consideration by the Federal Circuit as to the second step as to which of the three Weisgram alternatives are appropriate, and (2) does not provide a direction to the District Court below as to which of the three Weisgram alternatives the Federal Circuit has selected.

Even upon Petitioners' June 27, 2007 Petition for Rehearing (App. G at 41a) requesting that the Federal Circuit undertake its constitutional responsibility to consider and to choose one of the three Weisgram, supra alternatives, in response, the Federal Circuit was silent (App. I at 79a).

Respondent (Oppo. at 2) is incorrect in urging support of the Federal Circuit's DHI II decision (App. A at 10a) which reasoned that its prior DHI I decision (App. E at 21a) had fulfilled its constitutional responsibilities and implicitly foreclosed further consideration in DHI II.

The Federal Circuit in DHI II found that the Federal Circuit in DHI I was not constitutionally required to take steps 2 and 3, that of "considering" and "choosing" one of the three Weisgram alternatives. The Federal Circuit in DHI II (App. A) erroneously found that the Federal Circuit in DHI I had fulfilled its constitutional responsibility, when in fact it had not.

The Federal Circuit's, in DHI II (App. A at 10a), generalized references to authorities (cited in the Opposition at 2) which hold that matters implicitly determined in a Circuit Court's first opinion are deemed resolved, is inconsistent with finding the Federal Circuit fulfilled its Seventh Amendment obligations in the first instance (App. E) in that DHI I failed to (1) "consider" and (2) "direct" the District Court or instruct the District Court as to one of three Weisgram alternatives.

After the Federal Circuit's failure in DHI I (App. E at 21a) to consider and instruct, the District Court, then confronted with a partial reversal of a JMOL as to damages only, without direction, contingently commits error (App. C at 17a) by finding that, "...Even if this District Court had discretion ... it would be exercised in favor of defendants..." (App. C at 17a), in that the initial trial judge had retired, and the judge to whom the case was now assigned was in no better position than the appellate court to render a new trial determination (App. C at 17a).

Error by the Federal Circuit in DHI I, is compounded by the District Court's subsequent error.. The District Court in its decision (App. C at 17a) creates two classes of jury verdict winners upon a reversal of a JMOL as to liability, one whose trial judge was available after reversal to consider a new trial and a second class of jury verdict winners whose trial judge is no longer available.

The error by the Federal Circuit in DHI II was to find that the prior Federal Circuit decision in DHI I had fulfilled its Seventh Amendment responsibilities when the Federal Circuit in DHI I had not in fact "considered" and/or "directed," Weisgram, supra.

CONCLUSION

Petitioner DHI first asserts constitutional error by the Federal Circuit in DHI II (App. A at 1a) in finding that the Federal Circuit had previously fulfilled its Seventh Amendment obligations in DHI I (App. E at 21a), though it did not (1) "consider" and/or (2) "direct," any of the three (3) Weisgram alternatives.

DHI then asserts that the District Court (App. C at 17a) contingently abridged DHI's Seventh Amendment rights by indicating it would not consider a new trial even if it had discretion to do so in that it was not the judge that tried the case in the first instance.

DHI further asserts however, that its Seventh Amendment rights were abridged in the Federal Circuit's DHI II (App. A at 1a) finding not only that it had previously fulfilled its obligations in DHI I when no consideration or direction was provided, but DHI further asserts that its reliance upon the Federal Circuit's "invention" of the split denial of JMOL as

to liability, reversing a denial of JMOL as to damages..." only (App. A at 1a) (particularly given the facts and circumstances presented), requires entry of judgment below was inconsistent with the Seventh Amendment and should be reversed.

The Opposition asserts that the Petitioner "made misrepresentations" (Oppo. at 3) which is not only without basis, but is not helpful to the consideration of the issues presented.

Respectfully submitted,
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